

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 CORNELE A. OVERSTREET, Regional
4 Director of the Twenty-Eighth Region of the
5 National Labor Relations Board, for and on
6 behalf of the NATIONAL LABOR
7 RELATIONS BOARD,

8 Plaintiff

9 v.

10 DAVID SAXE PRODUCTIONS, LLC and V
11 THEATER GROUP, LLC,

12 Defendants

Case No.: 2:18-cv-02187-APG-NJK

**Order (1) Granting Motion to Expedite,
(2) Granting Motion to Try the Petition on
the Papers, and (3) Granting in Part the
Petition for Temporary Injunction**

[ECF Nos. 1, 2, 3]

13 Petitioner Cornele Overstreet, Regional Director for the National Labor Relations Board
14 (NLRB or Board), filed a petition for a temporary injunction against respondents David Saxe
15 Productions, LLC and V Theater Group, LLC under § 10(j) of the National Labor Relations Act
16 (NLRA). ECF No. 1. David Saxe Productions (DSP) provides support services, such as human
17 resources, to entertainment related companies like V Theater Group, LLC (V Theater). V
18 Theater operates the V Theater in the Planet Hollywood Miracle Mile Shops in Las Vegas. As
19 relevant here, DSP and V Theater employ stagehands and lighting and audio technicians.

20 In February 2018, some of the theater employees began to organize support to be
21 represented by the International Alliance of Theatrical Stage Employees and Moving Picture
22 Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO
23 (the Union). On April 26, 2018, the Union petitioned for a vote to become the exclusive
bargaining representative for certain theater employees. ECF No. 1-6 at 93. The vote was held
on May 17. *Id.* at 98. The majority of active employees voted against the union, but the outcome
is disputed because seven votes, which would change the result, were cast by employees who

1 were discharged before the election and thus not counted. ECF No. 1-6 at 145. If the employees
2 were unlawfully discharged, their votes would count, and the Union would become the
3 employees' bargaining representative. This case concerns events leading up to and following the
4 vote.

5 From April through August 2018, the union filed numerous charges with the NLRB
6 alleging DSP and V Theater had engaged in unfair labor practices. ECF No. 1-2 at 8-11, 16-18,
7 24, 28-30, 36. The NLRB consolidated those charges into a complaint against DSP and V
8 Theater. *Id.* at 40-49, 51-52, 54-71. DSP and V Theater filed an answer, and that matter is
9 pending before an administrative law judge (ALJ), who will make recommendations to the
10 Board. *Id.* at 73-75, 77-79.

11 In the meantime, NLRB Regional Director Overstreet petitions for this court for a
12 temporary injunction under § 10(j) of the NLRA against DSP and V Theater arising out of their
13 alleged unfair labor practices. Section 10(j) provides:

14 The Board shall have power, upon issuance of a complaint as
15 provided in subsection (b) charging that any person has engaged in
16 or is engaging in an unfair labor practice, to petition any United
17 States district court, within any district wherein the unfair labor
18 practice in question is alleged to have occurred or wherein such
19 person resides or transacts business, for appropriate temporary
relief or restraining order. Upon the filing of any such petition the
court shall cause notice thereof to be served upon such person, and
thereupon shall have jurisdiction to grant to the Board such
temporary relief or restraining order as it deems just and proper.

20 29 U.S.C. § 160(j). Injunctive relief in this context is designed “to protect the integrity of the
21 collective bargaining process and to preserve the [NLRB’s] remedial power while it processes
22 the charge.” *Avanti Health Sys., LLC*, 661 F.3d at 1187 (quotation omitted). The remedy is
23 meant to prevent someone from accomplishing an unlawful objective based on the delay between

1 the unfair labor practice and final resolution of the complaint process. *See Miller for & on Behalf*
2 *of N.L.R.B. v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc).

3 In determining whether temporary relief is just and proper under the circumstances, I
4 “consider the traditional equitable criteria used in deciding whether to grant a preliminary
5 injunction.” *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011) (quotation
6 omitted). Those criteria are: (1) a likelihood of success on the merits, (2) a likelihood of
7 irreparable harm, (3) the balance of hardships favors the plaintiff, and (4) an injunction is in the
8 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively,
9 under the sliding scale approach, the party seeking injunctive relief must demonstrate (1) serious
10 questions on the merits, (2) a likelihood of irreparable harm, (3) the balance of hardships tips
11 sharply in the moving party’s favor, and (4) an injunction is in the public interest. *All. for the*
12 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

13 The fact that the NLRB exercised its discretion to seek a § 10(j) injunction does not mean
14 I must defer to the Board in deciding whether interim relief is appropriate. *Small v. Operative*
15 *Plasterers’ & Cement Masons’ Int’l Ass’n Local 200, AFL-CIO*, 611 F.3d 483, 490 (9th Cir.
16 2010). However, I “should evaluate the probabilities of the complaining party prevailing in light
17 of the fact that ultimately, the Board’s determination on the merits will be given considerable
18 deference.” *Id.* (quotation omitted).

19 **I. Likelihood of Success on the Merits**

20 To show a likelihood of success on the merits in a § 10(j) proceeding, the Regional
21 Director must show a “probability that the Board will issue an order determining that the unfair
22 labor practices alleged by the Regional Director occurred and that this Court would grant a
23 petition enforcing that order, if such enforcement were sought.” *Frankl ex rel. N.L.R.B. v. HTH*

1 *Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (quotation omitted). The Regional Director makes a
2 “threshold showing of likelihood of success by producing some evidence to support the unfair
3 labor practice charge, together with an arguable legal theory.” *Avanti Health Sys., LLC*, 661 F.3d
4 at 1187 (quotation omitted). “Conflicting evidence in the record does not preclude the Regional
5 Director from making the requisite showing for a section 10(j) injunction.” *HTH Corp.*, 693 F.3d
6 at 1063 (quotation omitted).

7 Where, as here,¹ the Regional Director “seeks and receives approval from the NLRB
8 before filing a § 10(j) petition, the Director is owed special deference because likelihood of
9 success is a function of the probability that the Board will issue an order determining that the
10 unfair labor practices alleged by the Regional Director occurred.” *Avanti Health Sys., LLC*, 661
11 F.3d at 1187 (quotation omitted). “That the NLRB itself decid[ed] to file a Section 10(j) petition
12 might signal its future decision on the merits, assuming the facts alleged in the petition withstand
13 examination at trial.” *Id.* (quotation omitted).

14 **A. Section 8(a)(1)**

15 Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to
16 “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section
17 157 of this title.” 29 U.S.C. § 158(a)(1). Section 157 gives employees “the right to self-
18 organization, to form, join, or assist labor organizations, to bargain collectively through
19 representatives of their own choosing, and to engage in other concerted activities for the purpose
20 of collective bargaining or other mutual aid or protection” *Id.* § 157.

21 Overstreet asserts that DSP and V Theater violated this section through three sets of acts:
22 (1) granting a retroactive wage increase after learning of the union organizing efforts;

23 _____
¹ The Board approved the § 10(j) petition on November 2, 2018. ECF No. 12-3 at 85.

- 1 (2) creating the impression that management was surveilling the employees' union activities; and
2 (3) directing employees not to engage in union activities and threatening them for doing so.

3 1. Granting Benefits

4 Overstreet contends DSP and V Theater rushed through a retroactive raise for the
5 employees while they were considering union organizing as a way to convince the employees
6 they did not need the union. DSP and V Theater respond that the wage increase came before the
7 union filed a petition for an election, so there was no offer of increased benefits during the
8 "critical period" between the petition and the election. They also contend they had a legitimate
9 reason for the timing of the increase because former manager Jason Pendergraft had been
10 ordered to increase the employees' wages but failed to do so. They argue there is no evidence of
11 a link between the wage increase and an effort to discourage union activities.

12 Granting benefits to employees in an effort to influence a union representation election is
13 an unfair labor practice. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964). "The danger
14 inherent in well-timed increases in benefits is the suggestion of the fist in the velvet glove.
15 Employees are not likely to miss the inference that the source of benefits now conferred is also
16 the source from which future benefits must flow and which may dry up if it is not obliged." *Id.*;
17 *see also NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 666 (9th Cir.2001) (stating that a
18 "wage increase (or grant of a benefit) designed to impact the outcome of a representation
19 election is a 'hallmark' violation of the NLRA and is as highly coercive in its effect as
20 discharges or threats of business failure" (quotation omitted)). Thus, "conduct immediately
21 favorable to employees which is undertaken with the express purpose of impinging upon their
22 freedom of choice for or against unionization and is reasonably calculated to have that effect" is
23 an unfair labor practice. *Exch. Parts Co.*, 375 U.S. at 409.

1 Employers may justify the conferral of benefits before a representation election if they
2 can overcome the presumption that the benefits were related to the pending election. *NLRB v.*
3 *Anchorage Times Publ'g Co.*, 637 F.2d 1359, 1366-68 (9th Cir. 1981). "An important indicator
4 of [the employer's] motive is whether there has been a change from the status quo." *Id.* at 1367.
5 The timing of the wage increase and variations from the company's usual course of conduct can
6 be evidence of improper motive. *Id.* at 1368; *see also Free-Flow Packaging Corp. v. NLRB*, 566
7 F.2d 1124, 1129 (9th Cir. 1978) ("In the absence of evidence demonstrating that the timing of
8 the announcement of changes in benefits was governed by factors other than the pendency of the
9 election, the Board will regard interference with employee freedom of choice as the motivating
10 factor."). The employer bears the burden of establishing a "justifiable motive." *Free-Flow*
11 *Packaging Corp.*, 566 F.2d at 1129.

12 Overstreet has shown a likelihood of success on this charge. The employees received a
13 wage increase on March 14, 2018, the day after their second meeting with union representatives.
14 No employees had heard they would be getting a raise prior to when they were given. ECF No.
15 1-3 at 82, 120. The raises came about when David Saxe, owner and president of DSP and
16 president of V Theater, sent an email to payroll at 12:09 a.m. on March 14 directing an increase
17 in wages for many employees retroactive for the prior week's pay. ECF Nos. 1-5 at 74; 1-6 at 9,
18 30-31. Payroll employees arrived at work at 8:30 a.m. and had to finalize payroll by 11:00 a.m.
19 ECF No. 1-6 at 30-31. Thus, they had a very short time to process pay increases for numerous
20 employees.

21 There is evidence that pay increases had been discussed for months among management
22 and human resources personnel. *See* ECF Nos. 1-6 at 30-31; 11-16 at 38; 12-3 at 51-56.
23 However, the timing of the wage increase raises an inference of improper motive. There is no

1 explanation as to why, the day after the employees held their second meeting with union
2 representatives, there was a sudden need to rush through retroactive raises for the prior week's
3 pay. Indeed, the fact that pay rates had been discussed for months suggests there was no urgent
4 need to grant the raises retroactively. DSP and V Theater contend it was because Pendergraft
5 was supposed to increase wages earlier and had failed to do so. But the Board could find that
6 does not explain the coincidental timing and conflicts with evidence that after Pendergraft was
7 terminated in late February 2018, DSP and V Theater were still discussing compensation
8 structure, including paying a flat rate per show rather than a wage increase. ECF No. 12-3 at 56.
9 There is no evidence that the employer had previously granted retroactive wage increases or that
10 this was a regularly scheduled increase. Overstreet therefore has shown a likelihood of success
11 on his claim that the wage increase was designed to discourage employees from supporting the
12 union.

13 DSP and V Theater contend management did not know about the union organizing effort
14 until April 9 or 10 and so could not have acted with anti-union animus when making decisions
15 before then. *See* ECF Nos. 11-16 at 29-30; 11-18 at 10. However, there is evidence from which
16 the Board may conclude otherwise, including that stage managers Thomas Estrada, Jr., Daniel
17 Mecca, and Stephen Sojack knew about the union organizing effort early on; that Estrada
18 expressed anti-union sentiment in February 2018;² that Estrada told his girlfriend, stagehand
19 Courtney Kostew, that past organizing efforts ended in employees being fired; that Estrada saw
20 an employee passing out union cards in February and told his supervisor, Tiffany DeStefano,
21 about it; that Estrada and the other stage managers attended a meeting with upper management
22

23 ² Estrada denies making the comments attributed to him. ECF No. 11-24 at 8. However, contrary
evidence in the record does not preclude a showing of a likelihood of success on the merits.

1 on March 13; and that after or during that meeting, management requested volunteers for
2 previously unscheduled painting and repair work to be done at the same time as the planned
3 March 13 union meeting. *See* ECF Nos. 1-2 at 113, 129; 1-3 at 28-29, 107, 112-13; 1-4 at 81; 1-5
4 at 10-14, 23, 93-94, 97, 147-50; 1-6 at 6-7.

5 DSP and V Theater also argue they could not violate the NLRA by trying to sway the
6 union vote because the complained-of actions took place before the union filed a petition for an
7 election. However, the cases on which DSP and V Theater rely address when to set aside an
8 election. *See R. Dakin & Co.*, 191 NLRB 343 (1971); *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962);
9 *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1277 (1961). The “critical period” doctrine discussed
10 in those cases does not preclude the possibility that an employer committed an unfair labor
11 practice outside that time frame. *See Anchorage Times Pub. Co.*, 637 F.2d at 1365.

12 2. Creating the Impression of Surveillance

13 Overstreet contends DSP and V Theater created an impression that management was
14 surveilling union supporters. Specifically, Overstreet contends Estrada told stagehand Alanzi
15 Langstaff that he should not be seen talking to fellow employee and union supporter Zachary
16 Graham. Second, Saxe told employees Josh Prieto, Darnell Glenn, and Scott Tupy that he knew
17 they were pro-union and implied that Saxe had already lost their vote in the election. Finally,
18 DeStefano sent a text message to employees the day before the election asking them to inform
19 her whether and when they would be using company-supplied transportation to vote in the
20 election. DSP and V Theater respond that these issues involve credibility determinations that
21 ought to be resolved by the ALJ. They also contend DeStefano’s text message was sent for
22 logistical reasons and did not advocate a position on the vote or imply employer surveillance of
23 the vote.

1 The NLRB “has long held that, when, in comments to its employees, an employer
2 specifically names other employees as having started a union movement or as being among the
3 union leaders, the employer unlawfully creates the impression, in the minds of its employees,
4 that he has been engaged in surveillance of his employees’ union activities.” *In Re Royal Manor*
5 *Convalescent Hosp., Inc.*, 322 NLRB 354, 362 (1996).

6 Langstaff testified that in late February he talked to Graham about joining the union. ECF
7 No. 1-3 at 79-80. Estrada saw this conversation and told Langstaff that he should be careful
8 about being seen talking to Graham. *Id.* at 80-81, 97-98. A couple of days before the election in
9 May 2018, Saxe told Prieto, Glenn, and Tupy that he knew they were pro-union. ECF Nos. 1-3 at
10 117-19; 1-4 at 14-16, 48-50. Shortly before the election, DeStefano sent a text to employees
11 who were not scheduled to work the day of the election advising that there was a shuttle at the
12 theater that would take employees to the NLRB office to vote and return them to the theater.
13 ECF Nos. 1-4 at 51; 1-6 at 38, 106. She asked for employees to tell her whether they would be
14 taking the shuttle. ECF Nos. 1-6 at 103-06; 11-19 at 34-35.

15 Overstreet has shown a likelihood of success on this claim. Estrada’s warning to
16 Langstaff that he should not be seen talking to a known union supporter unlawfully creates the
17 impression that management was surveilling the employees’ union activities, and further carried
18 with it the implication that being seen engaging in union activity would negatively impact the
19 employees. Likewise, Saxe’s comments to Prieto, Glenn, and Tupy that he knew they were pro-
20 union suggested management surveillance of their union activities. Given that this comment was
21 made after the mass firings but before the vote, the Board could conclude it carried with it an
22 implied threat. While a close call, DeStefano’s text message inquiring about who would use the
23 company’s shuttle to attend the vote may have created the impression that management was

1 keeping track of who was voting in the election. Although the Board could also conclude that
2 DeStefano's text was merely about logistics rather than surveillance, at this stage it is at least
3 some evidence of surveillance.

4 3. Directing Employees Not to Engage in Union Activities

5 Overstreet contends DSP and V Theater violated § 8(a)(1) when Estrada warned
6 Langstaff not to be seen with Graham and when Estrada warned stagehands at a meeting to stop
7 complaining because he had 15 people lined up to take their jobs.

8 An employer violates § 8(a)(1) by directing employees not to talk to anyone about the
9 union or with anyone who was involved in the union. *See In Re Teledyne Advanced Materials &*
10 *United Steel Workers of Am., AFL-CIO, CLC*, 332 NLRB 539 (2000). Overstreet has shown a
11 likelihood of success on this claim by presenting evidence that Estrada warned Langstaff not to
12 be seen with Graham, who was distributing union materials. This allegation is sufficient to
13 support interim relief, so I do not address the allegation about Estrada's other comment.

14 **B. Section 8(a)(3)**

15 Section 8(a)(3) provides that it is an unfair labor practice for an employer "by
16 discrimination in regard to . . . tenure of employment . . . to encourage or discourage membership
17 in any labor organization." 28 U.S.C. § 158(a)(3). "An employer violates Section 8(a)(3) when
18 the employee's involvement in a protected activity was a substantial or motivating factor in the
19 employer's decision to discipline or terminate the employee." *HTH Corp.*, 693 F.3d at 1062.
20 The Regional Director bears the initial burden of "showing that the employee was engaged in
21 protected activity, the employer knew of such activity, and the employer harbored anti-union
22 animus." *Id.* If he does so, then "the burden shifts to the employer to demonstrate that it would
23 have taken the same action regardless of the employee's union activity." *Id.* "An employer

1 cannot prove this affirmative defense where its asserted reasons for a discharge are found to be
2 pretextual.” *United Nurses Ass’ns of Cal. v. Nat’l Labor Relations Bd.*, 871 F.3d 767, 779 (9th
3 Cir. 2017) (quotation omitted).

4 Overstreet contends DSP and V Theater violated this section by (1) discharging nine
5 employees for their protected activity, (2) reducing two employees’ hours, and (3) delaying an
6 employee’s return from medical leave and then subjecting him to closer supervision upon his
7 return.

8 1. Retaliatory Discharge

9 Overstreet contends DSP and V Theater discharged employees Taylor Bohannon,
10 Nathaniel Franco, Jasmine Glick, Kevin Michaels, Alanzi Langstaff, Leigh-Ann Hill, Michael
11 Gasca, Chris S’uapaia, and Zachary Graham for their protected activities. Glick, Franco,
12 Bohannon, and Graham were active members in a Facebook group chat the employees set up to
13 discuss unionization. Graham, Glick, Franco, Michaels, and Bohannon solicited union support
14 and invited employees to attend the March 13 meeting. All of these employees except Langstaff
15 attended that meeting. Gasca was not involved in the union campaign but disclosed to DSP and
16 V Theater during this time frame that he had been accepted to a union apprenticeship program.
17 Overstreet argues this suggested to DSP and V Theater that Gasca was inclined to support the
18 union. Additionally, Overstreet contends management knew who attended the March 13 union
19 meeting based on who stayed after their shift to work on the impromptu repair project. For
20 example, S’uapaia told Kostew that he could not stay, and Michaels left the repair project early
21 to attend the meeting. Finally, Overstreet argues the timing of the discharges, along with the
22 pretextual reasons for them, shows the discharges were retaliatory.

1 DSP and V Theater argue there is no evidence of anti-union animus and that they acted
2 only out of legitimate business concerns. DSP and V Theater also argue that former manager
3 Pendergraft failed to enforce policies or discipline employees for performance issues.
4 Pendergraft was fired on February 21, 2018 after an audit confirmed he stole money and
5 equipment. DSP and V Theater contend that during an investigation of Pendergraft's conduct,
6 DeStefano discovered numerous cases of poor performance and misconduct by other employees
7 that Pendergraft had not reported. DSP and V Theater assert that is why the employees were
8 terminated en masse in March 2018. They also contend Hill and Graham were terminated on
9 different dates for specific misconduct. DSP and V Theater maintain they were not aware of
10 union activity until April 9, 2018, so terminations prior to that date could not have been
11 retaliatory.

12 Overstreet has shown a likelihood of success on this claim because he has presented some
13 evidence and an arguable legal theory for the employees' retaliatory discharges. There is
14 evidence that these employees engaged in protected activity, including joining the Facebook
15 chat, recruiting other employees for the union effort, attending union organization meetings, and
16 handing out union cards at the theater. As discussed above, the Board has evidence from which
17 it could find that management was aware of the union organizing activity before the discharges.
18 Further, there is some evidence of anti-union animus, including Estrada's comments that prior
19 unionization efforts had resulted in employees being fired and that he was going to put an end to
20 the union effort.

21 DSP and V Theater have presented evidence that they would have taken the same action
22 regardless of these employees' union activity. As discussed in more detail below with respect to
23 whether reinstatement of these employees is a proper remedy, DSP and V Theater have

1 presented evidence of various performance failures, including tardiness and mistakes during
2 shows. DSP and V Theater also have presented evidence that following Pendergraft's firing,
3 they were attempting to restructure the staff to ensure proper scheduling and to retain the best
4 employees. However, there is some evidence that the employers' reasons for these terminations
5 were pretextual. The timing of the discharges, both in relation to the union organizing effort and
6 in relation to most of the employees being fired within days (and sometimes minutes) of each
7 other, raises an inference of retaliatory intent.

8 2. Reducing Hours

9 Overstreet contends DSP and V Theater reduced the work hours of employees Darnell
10 Glenn and Raymond Tupy in retaliation for their union support and that Saxe was aware of their
11 union sympathies, as shown by his May 15 statement to them that he knew they were pro-union.
12 Overstreet also contends the timing, along with the other evidence of anti-union animus, shows
13 unlawful motivation. DSP and V Theater assert that Tupy was properly disciplined for not
14 adhering to the schedule DeStefano created and that part of the restructuring effort was to reduce
15 hours because the theater was overstaffed.

16 Overstreet has shown a likelihood of success on the merits of this claim because he has
17 presented some evidence and an arguable legal theory that the change in work schedules, which
18 resulted in a reduction in work time, was retaliatory. Tupy engaged in protected activity because
19 he was a union member before he joined DSP and he fielded questions about the union from
20 other workers. ECF No. 1-4 at 7-9. Additionally, Tupy openly challenged comments made by
21 the anti-union persuader brought in by management just before the vote. *Id.* at 9-12, 45-46.
22 Glenn engaged in protected activity by attending the March 13 union meeting. *Id.* at 39. Saxe
23

1 knew about Tupy and Glenn's activities, as shown by his comment before the vote that he knew
2 they were pro-union.

3 Starting in early May, Glenn stopped getting called in early to do maintenance before
4 shows. ECF No. 1-4 at 52-53. Additionally, both Tupy and Glenn had a regular start time of
5 7:30 p.m. for the 8:30 p.m. shows. ECF No. 1-4 at 22-25, 31-32, 54. But after the election, their
6 scheduled start time changed to 8:00 p.m. *Id.* at 23, 54-55. Tupy nevertheless continued to show
7 up and sign in at 7:30 because he needed to come in long enough before the audience was let into
8 the theater at 8:15 to complete all of his pre-show tasks. *Id.* at 23-25, 31-32. Glenn complained
9 to DeStefano that coming in at 8:00 did not allow him sufficient time to complete required
10 equipment checks. *Id.* at 55-56. In response, DeStefano changed the start time to 7:45. *Id.* at 56.
11 Tupy was disciplined on June 20, 2018 for clocking in at 7:30. ECF No. 1-6 at 149-50.
12 According to the disciplinary document, DeStefano told Tupy that if he needed to come in early
13 for a specific repair, he should let her know and get her approval before coming in early or
14 staying late, but he persisted in coming in early without prior approval. *Id.*

15 The Board reasonably could conclude from the proximity to the election vote that Tupy
16 and Glenn's start time was changed in retaliation for their union support. The Board also could
17 conclude that management made them report to work so close to the time the audience entered
18 the theater that it was impossible for them to complete their required work in the time allotted,
19 thus setting them up for failure. That is not the only conclusion the evidence would support, but
20 contrary evidence in the record does not preclude a showing of a likelihood of success on the
21 merits.

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1 3. Delaying Return from Medical Leave

2 Overstreet contends DSP and V Theater delayed employee Stephen Urbanski's return
3 from medical leave, and then subjected him to more onerous work conditions and closer
4 supervision upon his return to work. I need not address these issues because Urbanski has
5 abandoned his job. ECF No. 11-43 at 25. I therefore will not award injunctive relief related to
6 this employee.

7 **II. Irreparable Harm**

8 A preliminary injunction may not be entered "based only on a possibility of irreparable
9 harm." *Operative Plasterers' and Cement Masons' Int'l Ass'n*, 611 F.3d at 490-91. Instead, the
10 party seeking relief must show irreparable harm is likely in the absence of preliminary relief. *Id.*
11 "[P]ermit[ing an] allegedly unfair labor practice to reach fruition and thereby render meaningless
12 the Board's remedial authority is irreparable harm." *Avanti Health Sys., LLC*, 661 F.3d at 1191
13 (quotation omitted).

14 Overstreet contends that the discharge of so many union supporters threatens to derail the
15 union organizing process and chill other employees' support, thus warranting interim injunctive
16 relief. DSP and V Theater respond that there is no irreparable harm because once the Board
17 issues its final order, it can make whole any injured employee. They also contend there is no
18 evidence that the employees want to be reinstated or that support for the union has been
19 diminished or is likely to diminish in the future.

20 I reject DSP and V Theater's argument that the Board's ability to later make discharged
21 employees whole means there is no irreparable harm. "[T]he discharge of active and open union
22 supporters risks a serious adverse impact on employee interest in unionization and can create
23 irreparable harm to the collective bargaining process." *Frankl v. HTH Corp.*, 650 F.3d 1334,

1 1363 (9th Cir. 2011) (quotation omitted). Thus, “a likelihood of success as to a § 8(a)(3)
2 violation with regard to union activists that occurred during contract negotiations or an
3 organizing drive largely establishes likely irreparable harm, absent unusual circumstances.” *Id.*

4 DSP and V Theater discharged nine active union supporters during the organizing
5 campaign. The record shows that union activity increased between the first and second union
6 meetings, but then dropped off after the mass firings, as evidenced by a decline in the number of
7 union authorization cards signed and in employee attendance at union organizing meetings. ECF
8 No. 1-5 at 68-69. Additionally, Kostew stated she was dropping out due to Estrada’s comment
9 that prior organizing efforts had resulted in firings. ECF No. 1-5 at 93. This diminished support
10 for the union is evidence that irreparable harm is likely absent a preliminary injunction.

11 **III. Balance of the Hardships**

12 DSP and V Theater argue that the balance of hardships tips sharply in their favor because
13 reinstatement of employees who were fired for cause violates the NLRA. DSP and V Theater
14 also argue an injunction would infringe on First Amendment rights by (1) forcing association
15 with a union on employees who voted against it, (2) being based on non-coercive speech, and
16 (3) requiring the employer to post and read a copy of this order. DSP and V Theater contend that
17 an injunction would cause irreparable harm because it would require them to reinstate employees
18 discharged for good cause, which will negatively impact the quality of shows at the theater and
19 would result in additional training and operational costs. Finally, they contend Overstreet made
20 no showing that the discharged employees want or are able to return to work for DSP and V
21 Theater, and these employees’ return would displace other employees.³

22
23 ³ DSP and V Theater also argue the discharged employees violated the ALJ’s sequestration order during the administrative hearing. But so did DSP and V Theater’s managerial employees. The ALJ presumably will address violations of her order.

1 **A. NLRA and Employees Fired for Good Cause**

2 DSP and V Theater argue that Overstreet’s request for reinstatement of the discharged
3 employees is an end run around 29 U.S.C. § 160(c), which precludes the Board from requiring
4 reinstatement of an employee who was discharged for cause. Overstreet responds that there is no
5 conflict between § 160(c) and an order for interim reinstatement under § 10(j).

6 Section 160(c) provides that “[n]o order of the Board shall require the reinstatement of
7 any individual as an employee who has been suspended or discharged, or the payment to him of
8 any back pay, if such individual was suspended or discharged for cause.” That section does not
9 apply here because § 160(c) governs the Board’s findings and award of relief, including
10 reinstatement. 29 U.S.C. § 160(c) (providing that if the Board finds an unfair labor practice, it
11 must state its findings and take “affirmative action including reinstatement of employees with or
12 without back pay”). It is in this context that § 160(c) states that the Board shall not order
13 reinstatement of an employee who was suspended or discharged for cause. The Board has not
14 determined that these employees were discharged for cause. Consequently, I am not precluded
15 from granting interim relief in the form of reinstatement under § 10(j). *See Frankl ex rel. NLRB*
16 *v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (affirming district court’s § 10(j)
17 reinstatement injunction despite employer’s argument that employee had been discharged for
18 cause).

19 **B. First Amendment Rights**

20 DSP and V Theater argue an injunction would infringe on First Amendment rights by
21 (1) forcing association with a union on employees who voted against it, (2) being based on non-
22 coercive speech, and (3) requiring the employer to post and read a copy of my order. Overstreet
23

1 responds that he is not requesting the union be recognized; rather, he seeks to restrain coercive
2 speech, and posting and reading of the order is an approved form of relief.

3 Overstreet does not request interim relief in the form of recognizing the union as the
4 employees' bargaining representative. Thus, my order will not force anyone to associate with
5 the union.

6 DSP and V Theater contend Saxe's statements to Glenn and Tupy were non-coercive and
7 non-threatening and so cannot support relief because Saxe had a right to express his views under
8 29 U.S.C. § 158(c). Section 158(c) "permits employers to express any views, arguments or
9 opinions concerning Union representation which contain 'no threat of reprisal or force or
10 promise of benefit.'" *NLRB v. Carilli*, 648 F.2d 1206, 1212 (9th Cir. 1981) (quoting 29 U.S.C.
11 § 158(c)). However, as discussed above, Overstreet has shown a likelihood of success on his
12 allegation that Saxe gave an impression of surveillance by identifying those he knew to be union
13 supporters. Given that nine union supporters had already lost their jobs when Saxe spoke to
14 Glenn and Tupy just two days before the union election, the Board reasonably could conclude
15 there was an implied threat. Additionally, there is evidence that Estrada made anti-union
16 comments that were coercive, linking union support to negative consequences including possible
17 job loss. An employer does not have a First Amendment right to engage in coercive speech. *See*
18 *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); 29 U.S.C. § 158(c). Consequently, the
19 balance of hardships does not tip in favor of DSP and V Theater based on allegedly non-coercive
20 comments.

21 Finally, DSP and V Theater contend their First Amendment rights would be violated if
22 they have to post a copy of my order, deliver an electronic copy of my order to all employees,
23 and schedule a meeting where my order is read to employees. They argue this would force them

1 to “appear guilty despite a final determination on the merits, or supportive of the respective
2 positions of Petitioner and the Union.” ECF No. 11 at 17. Overstreet responds that courts
3 routinely grant this remedy, as has the Board.

4 Courts have upheld reading an order as an “effective but moderate way to let in a
5 warming wind of information and, more important, reassurance.” *United Nurses Ass’ns of Cal. v.*
6 *NLRB*, 871 F.3d 767, 789 (9th Cir. 2017) (quotation omitted). “Public notice reading in
7 particular is designed to ensure that the important information set forth in the notice is
8 disseminated to all employees, including those who do not consult the [employer’s] bulletin
9 boards.” *UNF W., Inc. v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016) (quotation omitted). My
10 order will not require DSP, V Theater, or any management personnel to read the letter aloud or
11 email it to employees. Rather, the Board can read and email it. Moreover, it is obvious from this
12 order that DSP and V Theater do not agree with or support the positions of the Petitioner and the
13 Union. Finally, DSP and V Theater may disagree with my ruling or think it makes them look
14 guilty, but “[n]othing in the NLRA protects an employer from the embarrassment it might
15 experience as a byproduct of the Board’s remedy.” *United Nurses Ass’ns of Cal.*, 871 F.3d at
16 789. DSP and V Theater’s First Amendment concerns therefore do not tip the balance of
17 hardships in their favor.

18 **C. Reinstatement of Discharged Employees**

19 I have considered DSP and V Theater’s argument that reinstatement of discharged
20 employees would impose burdensome training costs. However, these costs are unquantified, and
21 the evidence shows employees receive on-the-job training that should result in little added
22 training costs. See, e.g., ECF Nos. 1-3 at 94, 118, 129; 1-5 at 130; 1-6 at 76-77; 12-2 at 98-99.
23 Additionally, the cues in a show sometimes change, so even long-time employees must be

1 retrained. ECF No. 12-2 at 96-97. Thus, I give little weight to training costs in the balancing of
2 hardships.

3 As discussed in more detail below, the balance of hardships in relation to reinstating the
4 discharged employees depends on the evidence related to each employee. Where there is
5 stronger evidence of retaliatory discharge and pretext, the balance weighs in favor of interim
6 relief in the form of reinstatement. Absent reinstatement, the union would face diminishing
7 support through the firing of key union supporters whom the union would be unable to protect,
8 thus further eroding support among the remaining employees.⁴ See *Frankl ex rel. NLRB v. HTH*
9 *Corp.*, 693 F.3d 1051, 1066 (9th Cir. 2012) (stating that termination of a known union supporter
10 “sends a message that the employer will take action against union supporters, which adversely
11 impacts employee interest in and support of unionization”). But where the evidence of pretext is
12 weaker and the evidence of poor work performance is stronger, the balance weighs against
13 reinstatement. If the Board finds all employees were unlawfully terminated, it can redress the
14 violations as to those employees for whom I do not order reinstatement. The interim relief I
15 award below is sufficient to address the concerns § 10(j) is designed to vindicate without
16 requiring an offer of reinstatement to all discharged employees.

17 **IV. Public Interest**

18 DSP and V Theater assert that the public interest does not support an injunction because
19 Overstreet delayed seeking an injunction for seven months; the hearing before the ALJ is
20 complete, so the parties should await the ALJ’s decision; and an injunction would displace the
21 new employees. They argue I should allow the administrative process to run its course.

22
23 ⁴ I give little weight to whether the discharged employees want their jobs back. Requiring an
offer of reinstatement is not just about making the discharged employees whole. It also sends a
message to other employees that retaliatory discharges will be redressed.

1 Delay is a factor I must consider. But “[d]elay by itself is not a determinative factor in
2 whether the grant of interim relief is just and proper.” *Aguayo*, 853 F.2d at 750. The Board
3 “needs a reasonable period of time to investigate and deliberate before it decides to bring a
4 section 10(j) action.” *Id.* Consequently, delay is significant only “if the harm has occurred and
5 the parties cannot be returned to the status quo or if the Board’s final order is likely to be as
6 effective as an order for interim relief.” *Id.*

7 I have considered DSP and V Theater’s argument that Overstreet unduly delayed seeking
8 injunctive relief. The parties can be returned to the status quo, and, given the delay inherent in
9 the administrative process, the Board’s final order is not likely to be as effective as interim relief.
10 A more important consideration of the public interest in § 10(j) cases, however, “is to ensure that
11 an unfair labor practice will not succeed because the Board takes too long to investigate and
12 adjudicate the charge.” *Small*, 661 F.3d at 1197 (quotation omitted).

13 Finally, in evaluating the reinstatement remedy, I give less weight to the interests of the
14 newly hired employees. The “rights of the employees who were discriminatorily discharged are
15 superior to the rights of those whom the employer hired to take their places.” *Aguayo for & on*
16 *Behalf of N.L.R.B. v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988), *overruled on*
17 *other grounds by Miller for & on Behalf of N.L.R.B. v. Cal. Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir.
18 1994); *see also McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 965–66 (9th Cir. 2010)
19 (“The rights of improperly discharged employees, assuming they were in fact wrongfully
20 terminated, are superior to those of their replacements.”).

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23 ////

V. Relief

Overstreet has shown a likelihood of success on the merits, a likelihood of irreparable injury, and that the balance of hardships and the public interest favor interim injunctive relief. I therefore consider what relief is just and proper under the circumstances. 29 U.S.C. § 160(j).

An injunction may be prohibitory or mandatory. A “prohibitory injunction prohibits a party from taking action and preserve[s] the status quo pending a determination of the action on the merits.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (quotation omitted). In contrast, a “mandatory injunction orders a responsible party to take action.” *Id.* (quotation omitted). “A mandatory injunction goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.” *Id.* (quotation omitted). Generally, a court should not grant a mandatory injunction “unless extreme or very serious damage will result.” *Id.* (quotation omitted). A mandatory injunction is “not issued in doubtful cases or where the injury complained of is capable of compensation in damages.” *Id.* (quotation omitted).

A. Prohibited Conduct

I grant Overstreet’s requested relief that DSP and V Theaters be enjoined from: (1) discharging, disciplining, or assigning more onerous work conditions in retaliation for union support or union activity; (2) granting benefits to induce employees to abandon union organizing; (3) creating the impression that employees’ union activities are under surveillance; and (4) threatening employees with unspecified reprisals or job loss for supporting a union. These requests are supported by the evidence and require DSP and V Theater to do what the law already obligates them to do. I decline to enjoin DSP and V Theater from soliciting grievances or promising to remedy them in order to discourage union activities and support. The evidence

1 on this point was sparse and there was no evidence of any promise by DSP, V Theater, or their
2 representatives to remedy grievances. *See* ECF No. 1-3 at 119, 131. Finally, I need not enjoin
3 DSP and V Theater from interfering with employees' rights in any other manner. Should DSP
4 and V Theater engage in other unfair labor practices, remedies exist to address such misconduct
5 without resorting to a general prohibition in an injunction.

6 **B. Reinstatement**

7 Overstreet requests that I order DSP and V Theater to offer reinstatement to discharged
8 employees Zachary Graham, Kevin Michaels, Chris S'uapaia, Leigh-Ann Hill, Michael Gasca,
9 Jasmine Glick, Alanzi Langstaff, Taylor Benavente Bohannon, and Nathaniel Franco.

10 1. Zachary Graham

11 I will order DSP and V Theater to offer reinstatement to Zachary Graham because the
12 evidence of pretext related to his firing is particularly strong and there is no evidence his rehire
13 would burden his employers with unsatisfactory performance. Graham engaged in union
14 activities, including attending the February 28th meeting and speaking about the union with
15 several other employees, including DeStefano and Estrada. ECF No. 1-2 at 130-36. On February
16 28, he spoke to DeStefano about family medical leave because he had broken his arm in an off-
17 the-job incident. *Id.* at 133-34. According to Graham, DeStefano told him not to worry about it,
18 that his job was safe, and he would have a job when he was healed. *Id.* at 134.

19 On March 21, DeStefano sent an email about Graham to Saxe in which she stated she did
20 not receive proper paperwork from Graham regarding his medical leave and had not been able to
21 contact him. ECF No. 1-6 at 90. She stated that she had decided to terminate his employment on
22 March 1 because he would not respond to multiple efforts to contact him. *Id.*

1 That same day, DeStefano texted Graham stating that she had been trying to reach
2 Graham for weeks without success. ECF Nos. 1-2 at 144; 1-6 at 86. Graham responded within
3 fifteen minutes that he had not received any texts or calls from DeStefano except the ones he
4 received that day. *Id.* DeStefano replied that she had asked Graham previously to provide a
5 doctor's note but he did not do so, and he had not responded to her repeated calls or texts until
6 now. *Id.* at 87. DeStefano stated that Graham was "termed a while ago for job abandonment and
7 failure to comply with the company policies & procedures." *Id.* at 87-88. Graham's termination
8 form states as reasons for his termination his failure to respond to multiple texts and phone calls
9 and he did not show proof of a doctor's note following his arm being broken. ECF No. 1-4 at 65.

10 Graham testified, however, he had not missed any calls or texts from DeStefano. ECF
11 No. 1-2 at 143-44. His phone does not show any missed text messages from DeStefano between
12 February 24 (when DeStefano asked for a doctor's note) and March 21 (when she stated she had
13 been trying to reach him for weeks through calls and texts). ECF No. 1-6 at 86. Other
14 employees testified they saw Graham come to the theater several times during this period. ECF
15 No. 1-3 at 7-8, 81. On March 13, Graham went to the theater to talk to other employees about
16 going to the meeting that night. ECF No. 1-2 at 135-36.

17 The evidence of pretext is strong. DeStefano's claim that she could not reach Graham
18 despite multiple attempts is belied both by Graham's testimony and his phone, which shows no
19 missed texts from DeStefano. Although DeStefano contends she could not contact Graham,
20 other employees saw him in the theater on multiple occasions throughout March. The evidence
21 also shows Graham responded immediately to the March 21 text, suggesting he would respond to
22 texts from DeStefano if she had actually sent him any. DSP and V Theater present no evidence
23 that Graham was an unsatisfactory employee, and he was not fired for poor job performance. To

1 the contrary, in early February 2018, DeStefano ranked Graham as the fifth best stagehand out of
2 twenty-one. ECF No. 1-6 at 63. DSP and V Theater therefore would not suffer hardship in
3 having to reinstate him. To the extent they would suffer some harm, either through retraining or
4 having to discharge a replacement employee, those harms are outweighed by the harm caused by
5 Graham's retaliatory discharge. I therefore order DSP and V Theater to offer reinstatement to
6 Graham.

7 2. Kevin Michaels

8 Michaels learned of the unionizing effort through Graham. ECF No. 1-3 at 5. Michaels
9 spoke with other employees about the union and he attended the March 13 union meeting. ECF
10 No. 1-3 at 8-10. On the day of that meeting, DeStefano informed Michaels of the repair and
11 maintenance work to be done that night. ECF No. 1-3 at 11. Additionally, after that evening's
12 show, Estrada started informing the employees about the repair work. *Id.* Michaels informed
13 Estrada that he could stay only until midnight because he had something else to do. *Id.* Michaels
14 left around midnight and went to the union meeting. *Id.* at 12. After that meeting, Michaels
15 spoke to other employees at the theater about upcoming union meetings. *Id.* at 14.

16 DeStefano sent Saxe an email regarding Michaels on March 16. ECF No. 1-6 at 41. She
17 stated that Michaels works hard but he has an attitude problem and would not follow
18 DeStefano's schedule. *Id.* She also stated he was not willing to learn other jobs and brought
19 down the morale of other employees because he did not seem to care about the job. *Id.*

20 The decision to fire Michaels was part of the mass terminations on March 15 and 16,
21 although Michaels was not actually discharged until April 2. ECF Nos. 1-3 at 5; 1-5 at 109. That
22 day, Michaels received a call informing him to contact the human resources department. ECF
23 No. 1-3 at 17. He returned the call the next day and was told he was terminated for

1 insubordination, bad attitude, and poor work performance. *Id.* at 17-18. Michaels' termination
2 form stated he violated company policies, "including insubordination, poor work attitude and
3 poor work performance." ECF No. 1-4 at 66. According to DeStefano, Michaels was often tardy
4 and once was late for the start of the show. *Id.* at 109-110. DeStefano stated that she spoke to
5 Michaels multiple times per week since January about his tardiness and refusal to abide by the
6 schedule. *Id.* at 110.

7 The evidence of pretext is strong. DeStefano reported that she had counseled Michaels
8 numerous times in the early months of 2018. Yet Michaels was not disciplined until the decision
9 was made to terminate him along with all of the other union supporters in mid-March 2018,
10 within two days after Michaels left the impromptu repair project early to attend the March 13
11 union meeting. Additionally, Estrada, who was Michaels' supervisor, knew about Michaels'
12 conduct and there is no evidence Estrada disciplined him for it. ECF No. 12-2 at 36-37.
13 Approximately a month earlier, DeStefano had ranked Michaels as the seventh best stagehand
14 out of twenty-one on the factors of "reliability, attitudes, etc.," despite his alleged chronic
15 tardiness and refusal to abide by the schedule. ECF No. 1-6 at 63. Moreover, Michaels disputes
16 DeStefano's statement that he was unwilling to learn other tasks, asserting that he had not been
17 asked to do so and he in fact had suggested to Estrada in January or February that he and another
18 employee learn a different task. ECF No. 12-2 at 34-35. Because the evidence of pretext is
19 strong and the evidence of poor performance is weak, I order DSP and V Theater to offer
20 reinstatement to Michaels.

21 3. Chris S'uapaia

22 S'uapaia first learned of the organizing effort on February 28 from another employee.
23 ECF No. 1-3 at 67. On the night of the March 13 meeting, he attended a show at the theater as a

1 guest, instead of working it. *Id.* at 68-69. After the show, Kostew asked him if he could stay and
2 do the repair work, but he said he could not because he was there with his wife. *Id.* at 69. After
3 the show, S'uapaia went to the union meeting. *Id.* at 71.

4 DeStefano sent an email about S'uapaia to Saxe on March 15. ECF No. 1-6 at 39. She
5 stated he does not work much and calls off work to attend to other obligations. *Id.* She also
6 stated he would complain about doing tasks due to a prior injury and a fear of tripping. She
7 stated he was not a good fit for the company because it was getting harder to adjust to his
8 availability and accommodations. *Id.* at 39.

9 Soon after S'uapaia arrived at work on March 19, DeStefano told him he was being let
10 go. ECF No. 1-3 at 71-72. DeStefano told him that the theater was going in a new direction with
11 entirely new outside staff. *Id.* S'uapaia asked about whether seniority would play into the
12 decision about who would stay on board, but DeStefano did not respond specifically to that
13 question. *Id.* at 72-73. S'uapaia pressed DeStefano for more information, at which point she
14 stated that she learned from Sojack that S'uapaia was unable to move backwards while doing his
15 job because of a leg injury. *Id.* at 73. S'uapaia responded that as long as he moves forward he
16 can do his job, he just could not move backward because of his leg. *Id.* DeStefano responded
17 that if he could not do the job, then the company could not use him. *Id.* DeStefano told him he
18 also was being terminated "due to his shrinking availability," his calling out of work for no
19 reason, and because the theater was restructuring and looking at various employees'
20 performance. ECF No. 1-6 at 79-80. S'uapaia's termination form states he cannot perform the
21 job "to the fullest extent." ECF No. 1-4 at 64. The form also states that he cannot walk
22 backwards and "always has an excuse." *Id.*

1 The evidence of pretext is strong. S'uapaia's inability to move backwards while carrying
2 items stems from a 2015 accident in which he broke bones and ripped muscles and tendons in his
3 leg. ECF No. 1-3 at 74. DSP and V Theater had been accommodating his disability for several
4 months. ECF No. 12-2 at 90-91, 100-02. There is no explanation as to why, in March 2018, it
5 suddenly became an insurmountable problem for the company.⁵ The timing is particularly
6 suspect given that only days before, S'uapaia refused to stay for the repair work and instead
7 attended the union meeting. Additionally, DeStefano gave shifting reasons for his termination. I
8 therefore order DSP and V Theater to offer reinstatement to S'uapaia.

9 4. Leigh-Ann Hill

10 Hill learned about the union organizing effort in mid-February 2018 and she joined the
11 Facebook chat group. ECF No. 1-3 at 27, 30. She also reached out to fellow stagehands about
12 talking to union representatives. *Id.* at 27-28. On February 21, Hill invited stage manager Mecca
13 into the Facebook chat group. *Id.* at 28, 37-38.

14 On March 1, Hill spoke to DeStefano about taking a few days off work so Hill could
15 work on another project. ECF No. 1-3 at 30. DeStefano responded that was not a problem. *Id.* at
16 31. Hill then voiced concerns about work conditions, including low morale and insufficient
17 wages. *Id.* Hill also complained that it was hard to work there because when she asked for things
18 needed for her job, her requests were denied or delayed. *Id.* Hill told DeStefano it was time to
19 make things better, that she was tired of being underpaid, and the job was the lowest-paying one
20 she had had. *Id.* at 31-32. DeStefano replied that Pendergraft was recently fired and they would
21 start working to make things better. *Id.* at 32. Hill then began yelling and cursing, at which point
22

23 ⁵ I do not address whether this is a legally valid reason for his termination under applicable
disability laws, as that issue is not before me.

1 theater manager Michael Moore walked into the office. *Id.* at 32. Moore told Hill to be patient as
2 they were trying to make things better. *Id.* Hill calmed down, apologized for cursing and yelling,
3 and stated she understood they were working on it. *Id.*

4 That same evening, Hill went home and opened up the Facebook group chat. *Id.* at 32-33.
5 She saw a message from Kostew stating that Hill was feeding information to DeStefano about
6 the employees organizing. *Id.* at 33; ECF No. 1-4 at 103. Kostew made a comment about being
7 worried that she would be fired for participating in union activities. ECF No. 1-3 at 33. Hill
8 responded that that would be illegal. *Id.* at 33-34. Kostew then stated she did not want to be part
9 of the union campaign any longer. *Id.* at 34. Hill removed Kostew from the group chat the next
10 day, March 2. *Id.* at 34-35.

11 Hill was scheduled to work on March 2, but she received a call telling her she was
12 terminated. *Id.* at 35. According to Hill, she was told her termination was due to restructuring
13 and because Hill had obtained other employment. *Id.* at 35. Hill's termination form states she
14 was fired for violating company policies and a poor attitude. ECF No. 1-4 at 58. However,
15 human resources manager Takeshia Carrigan stated that a bad attitude was not a reason for Hill's
16 termination. ECF No. 1-5 at 49, 55. According to Carrigan, Hill was terminated for trying to
17 switch her schedule to accommodate a new job. *Id.* at 56. DeStefano later handwrote an
18 additional reason on Hill's termination form: "+ secondary employment." ECF No. 1-5 at 45, 64-
19 65.

20 The evidence of pretext is strong. DeStefano approved Hill's schedule change, so it
21 would be puzzling for her to fire Hill on that basis. After DeStefano approved the change, Hill
22 began to complain about working conditions at the theater. Hill was active in the Facebook chat
23 group, so her complaints could have been construed as advocating for the union to come in and

1 assist employees with improving the situation. Additionally, there were shifting reasons for
2 Hill's termination. Her termination form mentions a poor attitude, yet Carrigan testified that was
3 not a reason for her termination. The form also mentions violation of company policies, but it is
4 unclear what policy Hill violated. It was only later that DeStefano handwrote an additional
5 reason on the form. Hill apparently performed her job well. *See* ECF No. 12-2 at 91 (Sojack
6 stating Hill performed well). The defendants therefore would not be unduly burdened by having
7 to reinstate her. I order DSP and V Theater to offer reinstatement to Hill.

8 5. Michael Gasca

9 Gasca was a part-time stagehand for DSP and V Theater. ECF No. 1-3 at 43-44. In
10 October 2017, Gasca asked for time off in January and February to pursue a Teamsters Union
11 apprenticeship program. *Id.* at 46. In December, the stage managers informed him they had not
12 yet found someone to cover his time. *Id.* at 49-50. In January, someone from the company
13 (Gasca could not recall who) called him and stated the company believed he had resigned. *Id.* at
14 50-51. Gasca explained that he had not resigned but he had asked for a leave of absence. *Id.* at
15 51. Gasca went to the theater to talk to Pendergraft, who told him they could not allow him to
16 take time off, so they were going to let him go and rehire him later. *Id.* Gasca stated he did not
17 want that and if the company needed him on an emergency basis, they could call him. *Id.* at 52.
18 Pendergraft responded that he could put Gasca in an on-call position and Gasca agreed. *Id.*

19 Gasca was accepted into the apprenticeship program on February 26. *Id.* at 55; ECF No.
20 1-5 at 91. In early March, Gasca went to the theater to tell stage managers Sojack, Estrada, and
21 Mecca that he had been accepted into the program. ECF No. 1-3 at 56. Gasca asked Sojack for
22 more hours at the theater because the apprenticeship was unpaid. *Id.* at 58. Sojack referred
23

1 Gasca to DeStefano for scheduling. *Id.* at 59. DeStefano informed Gasca that she would see
2 what she could do about getting him additional hours. *Id.*

3 That night, DeStefano called Gasca around midnight, but he missed the call. *Id.* at 59-60.
4 Gasca went to the theater the next day, at which point DeStefano advised him he was terminated.
5 *Id.* at 60-61. DeStefano told him he was a bad worker, had a bad attitude, and had no experience
6 backstage. *Id.* at 61. DeStefano sent Saxe an email on March 16, 2018 stating Gasca was
7 “mediocre” and he missed cues that affected the show performance. ECF No. 1-6 at 50.
8 DeStefano wrote that Pendergraft agreed Gasca could be on call, but she did not agree with this
9 decision because Gasca had a terrible attitude and constantly complained about his pay and
10 hours. *Id.* DeStefano stated she no longer needed employees on call and Gasca’s bad attitude
11 may affect the morale of other employees. *Id.* Gasca’s termination form stated his attitude was
12 “awful and he was always complaining about hours/pay.” *Id.* at 63. It also stated he took a leave
13 of absence but “now wants hours.” *Id.* Finally, the form states he “[m]essed up shows a lot.” *Id.*

14 The evidence of pretext supports reinstatement. DeStefano initially told Gasca she would
15 see what she could do about getting him more hours. Instead, she fired him. The Board could
16 find her comments about Gasca’s poor attitude, specifically that he complained about hours and
17 wages, is code for union support. The Board likewise could find her comment that Gasca’s poor
18 attitude would affect the morale of other employees was code for encouraging other employees
19 to support the union.

20 There is some evidence that Gasca’s performance was subpar. *See* ECF Nos. 11-40 at 6
21 (Mecca stating Gasca’s performance was not stellar because he would miss cues and socialize
22 with the cast instead of paying attention to his job); 11-41 at 3 (Sojack stating Gasca’s
23 performance varied over time, as he missed cues and may have been disciplined for lateness).

1 However, DSP and V Theater had previously tolerated Gasca's uneven performance. Indeed,
2 management previously was concerned about not having Gasca around when he requested a
3 leave of absence. That does not suggest his performance was so poor that discharge was
4 inevitable regardless of his union support. I order reinstatement of Gasca.

5 6. Jasmine Glick

6 Glick was a member of the Facebook chat group. ECF No. 1-2 at 115, 117. She attended
7 the first meeting with union representatives on February 28. *Id.* at 117. After that, she spoke to
8 several other employees about their interest in unionizing. *Id.* at 118-19. She had some of these
9 conversations at work, but she tried to avoid cameras that management had placed in the theater.
10 *Id.* at 114-15, 118. Glick also attended the March 13 union meeting. *Id.* at 120.

11 DeStefano sent an email to Saxe on March 15, 2018 stating that Glick was often not at
12 work when asked, had a bad attitude, bad mouthed the company, was lazy, and was constantly on
13 her phone. ECF No. 1-6 at 37. DeStefano stated that due to prior management, Glick had not
14 been written up for her alleged performance failures. *Id.*

15 After Glick worked her shift on March 18, she received a call from DeStefano at 11:30
16 p.m. *Id.* at 121. DeStefano told Glick that the company was going to be restructuring and that
17 Glick was terminated. *Id.* at 122. Glick's termination form states that she has a "long history of
18 insubordination & attitude. Due to previous management she was never written up & always let
19 off the hook for the awful things she has said & done. Her job performance was never putting
20 shows first" ECF No. 1-4 at 59.

21 The evidence of pretext supports reinstatement. The timing of Glick's termination
22 coincides with the discharge of other union supporters. Additionally, DeStefano told Glick she
23 was being fired due to restructuring, but the termination form refers to a bad attitude and

1 insubordination. The reference to a bad attitude could be code for Glick's union activities.
2 DeStefano gave no details about the supposedly "awful things" Glick said and did. Further, it is
3 unclear why, if Glick had a long history of insubordination, her termination was suddenly
4 necessary in March, just days after Glick attended the March 13 union meeting.

5 There is evidence Glick was not a perfect employee. She admitted she used her cell
6 phone while on duty even after all employees had been told more than once not to use their
7 phones at work. ECF No. 11-11 at 8-9. She also admitted that in her last month of work she was
8 late at least four times. *Id.* at 10. I nevertheless conclude that the evidence of anti-union motive
9 and pretextual reasons for termination support reinstatement for this employee. Should Glick
10 return to work and continue to use her phone while on duty after having been told not to, DSP
11 and V Theater are free to discipline her for violating company policies so long as that discipline
12 is not motivated by anti-union animus.

13 7. Alanzi Langstaff

14 Langstaff learned about the organizing effort from Graham in late February. ECF No. 1-3
15 at 78-79. In either late February or early March, Estrada saw Langstaff and Graham speaking
16 outside the Saxe Theater in the parking garage. *Id.* at 80, 97-98. As Langstaff re-entered the
17 theater, Estrada told him to be careful being seen talking to Graham. *Id.* at 80, 97.

18 After Graham broke his arm in February, Estrada announced that Kostew would take
19 over cue calling. ECF No. 1-3 at 84, 87-88. Langstaff requested to meet with DeStefano over
20 this change. *Id.* at 85. Langstaff told her that he believed there was a conflict of interest in
21 Estrada promoting Kostew as cue caller given that Kostew was Estrada's girlfriend. *Id.* at 85.
22 DeStefano responded that it was her idea. *Id.* DeStefano then asked Langstaff if he was
23

1 interested in getting more hours, and he said he was. *Id.* at 85-86. She said she would see what
2 could be done about that. *Id.*

3 DeStefano sent an email to Saxe on March 16, 2018 documenting reasons to terminate
4 Langstaff. ECF No. 1-6 at 35. She stated Langstaff had problems with timeliness, work ethic,
5 attitude, and performance, including an unwillingness to stay after shows to work on
6 maintenance. *Id.* She also stated he was screaming and arguing with another stagehand, Ivan
7 Barrera. *Id.* And she mentioned Langstaff's complaint about favoritism. *Id.* DeStefano noted
8 that she did not have documentation of his poor performance because of prior management's
9 unwillingness to supervise and discipline employees. *Id.*

10 Langstaff was scheduled to work on March 16, 2018 but did not work that day due to a
11 medical situation that required him to spend the night in the hospital. *Id.* at 88. On the 19th,
12 Carrigan called Langstaff and told him he was being let go due to restructuring and because they
13 were bringing in an outside source for employees. *Id.* at 90-91. Langstaff later talked to
14 DeStefano who said the same thing. *Id.* at 91. His termination form states he had "poor job
15 performance all around," including problems with "timeliness," was "not the hardest worker,"
16 and was "lazy." ECF No. 1-4 at 62. The termination form also stated Langstaff had a "[v]ery
17 poor attitude." *Id.*

18 Although this is a close call, an order of reinstatement is just and proper under the
19 circumstances. Langstaff was part of the mass firing of union supporters in mid-March. The
20 reasons for his termination shifted, suggesting pretext. He was told his termination was due to
21 restructuring and an outside source for employees but his termination form mentioned job
22 performance issues. Among those issues was a "poor attitude," which may be code for union
23 support. Langstaff was disciplined in January for tardiness. ECF No. 11-28. However, there

1 does not appear to be any particular incident or performance failure linked to his termination in
2 mid-March. While DSP and V Theater contend the timing is explained by Pendergraft's
3 termination and DeStefano holding employees to a higher standard, there is evidence from which
4 the Board could conclude otherwise.

5 I am hesitant to order an employer to reinstate an employee who allegedly intimidated a
6 fellow employee. In August 2017, Langstaff was involved in an incident with another employee,
7 Ivan Barrera, who still works at DSP and V Theater. ECF No. 11-14. Barrera testified he had a
8 dispute with Langstaff about how Langstaff handed set pieces to him. ECF No. 11-13 at 3.
9 Langstaff (who is a large individual) approached Barrera (who is much smaller) in an aggressive
10 manner. *Id.* at 4. Langstaff asked Barrera why he was acting like a "little bitch" and complaining
11 about him to managers. *Id.* at 6. Barrera responded by telling Langstaff that if he had an issue,
12 he should speak to a manager. *Id.* at 7. Langstaff continued berating Barrera, so Barrera told
13 Langstaff to stop handing off the set pieces in such an aggressive manner that it risked injury to
14 Barrera. *Id.* at 9. Estrada came over and broke up the argument. *Id.* at 9-10. Langstaff later re-
15 initiated the argument as Barrera was leaving for the evening. ECF No. 11-14. Another
16 employee broke up that argument. *Id.* After the incident, when the two interacted at work
17 Langstaff told Barrera he was going to get slapped, challenged him to go "man to man," and
18 engaged in other intimidating tactics. ECF No. 11-13 at 13-18.

19 This testimony is concerning. However, DSP and V Theater retained Langstaff long after
20 this incident, and this is not mentioned as a reason for his termination. Consequently, his
21 conduct towards Barrera did not impact his employment status. The evidence of anti-union
22 motive and pretextual reasons for termination therefore support reinstatement for this employee.
23 Should Langstaff return to work and continue to engage in inappropriate behavior, DSP and V

1 Theater are free to discipline him so long as that discipline is not motivated by anti-union
2 animus.

3 8. Taylor Bohannon

4 In early February 2018, Bohannon joined the Facebook group chat. ECF No. 1-2 at 87.
5 Bohannon also attended five meetings regarding unionization, the first in late February. *Id.* at 87-
6 88. After the first meeting, DeStefano discussed with Bohannon reducing Bohannon from full
7 time status to part time because Bohannon had just returned to work following surgery. *Id.* at 89-
8 90. Bohannon attended a second union meeting on March 9th. *Id.*

9 DeStefano wrote an email to Saxe on March 15 indicating she had received a few
10 complaints about Bohannon when Bohannon had first started, but that DeStefano had not heard
11 anything since then until recently, when someone complained Bohannon was not very good. *Id.*
12 ECF No. 1-6 at 46. She also stated that Bohannon was not “horribl[y] screwing up,” but was
13 merely adequate, and that was insufficient. *Id.* DeStefano added in another email that she heard
14 from the cast that the show is “getting worse” with Bohannon, although no specifics were
15 provided. *Id.*

16 Two days later, DeStefano left a phone message for Bohannon, which Bohannon
17 responded to the next day. ECF No. 1-2 at 93. DeStefano told Bohannon that her position was
18 being terminated due to restructuring. *Id.* She also told Bohannon that the termination was not
19 due to tardiness or being insubordinate but that there were some concerns about how Bohannon
20 had run a show. *Id.* at 93-94. Bohannon’s termination form states she was “unable to execute her
21 shows properly,” they received complaints from cast members and producers, and she reduced
22 the quality of shows. ECF No. 1-4 at 61.

1 Although Overstreet has shown a likelihood of success on the merits that Bohannon's
2 termination, as part of the mass terminations in mid-March 2018, was animated by anti-union
3 motive, I do not find reinstatement a just and proper remedy. Bohannon admitted that she was
4 told on more than one occasion that she was missing cues. ECF No. 11-9 at 3-4. The evidence of
5 pretext is weaker with Bohannon because shortly before Bohannon's termination, DeStefano and
6 Saxe received complaints about her from performers in the shows. ECF No. 11-10 at 3
7 (testimony of a performer indicating that Bohannon did not know how to run the show and if
8 something went wrong, she could not fix it and would have to call a full-time audio technician
9 for help). That performer complained to Saxe about Bohannon's performance in late February or
10 early March. ECF No. 11-16 at 3-4. Other performers also complained to Saxe about Bohannon.
11 *Id.* at 4. The performers are not involved in the union campaign and are not theater management.
12 Thus, their complaints about Bohannon's work are particularly credible in this context because
13 they have no motive to paint Bohannon in any particular light.

14 I decline to order DSP and V Theater to offer reinstatement to Bohannon. Because I am
15 ordering DSP and V Theater to offer reinstatement to seven of the nine terminated employees,
16 and (as discussed below) to restore the schedules of Tupy and Glenn, the purposes of granting
17 § 10(j) relief are sufficiently vindicated without requiring DSP and V Theater to hire an
18 employee about whom they received numerous complaints from performers. With respect to this
19 employee, the balance of hardships tips in favor of the employer.

20 9. Nathaniel Franco

21 Franco joined the Facebook chat group and attended two union meetings in March. ECF
22 No. 1-2 at 101-03. Outside the meetings, Franco spoke to other employees about possibly
23 unionizing. *Id.* at 104-05.

1 DeStefano sent Saxe an email on March 14, 2018 stating that she had recently received
2 complaints about how Franco ran sound for a show, that he missed cues, and that he tended to
3 play the wrong music for certain acts. ECF No. 1-6 at 52. She wrote that prior complaints had
4 been made about Franco to Pendergraft, who responded that Franco would be trained on the
5 matter. *Id.* DeStefano stated that Franco has obtained almost double the training of other
6 employees, but he was still making mistakes. *Id.* Saxe responded the next day that Franco
7 should be terminated as soon as DeStefano found a replacement. *Id.* at 52-53. That evening,
8 DeStefano reported to Saxe that Franco played two incorrect announcements in that night's
9 show. *Id.* at 53; *see also* ECF No. 11-18 at 32-34.

10 On March 18, after Franco's shift was over, DeStefano spoke with Franco on the phone
11 and advised him he was terminated. *Id.* ECF No. 1-2 at 105-06. Franco's termination form states
12 he was fired because was "unable to execute shows," there were complaints from cast members,
13 and he made mistakes during shows. ECF No. 1-4 at 60.

14 I do not find reinstatement is a just and proper remedy for similar reasons as discussed
15 with respect to Bohannon. Franco admits that prior to his termination he was advised on more
16 than one occasion that he played the wrong music during a show. ECF No. 11-12 at 6. He
17 admits it disrupted the show and the audience could tell there was a mistake. *Id.* at 7. Indeed,
18 Franco himself described one incident as a "disaster." *Id.* at 9-10. I therefore do not order DSP
19 and V Theater to offer reinstatement to Franco.

20 **C. Restore Work Schedules**

21 Overstreet has shown a likelihood of success on its claim that Tupy and Glenn's
22 schedules were changed due to their union support. DSP and V Theater have not identified any
23 hardship they would suffer from returning Tupy and Glenn to their prior schedules, which is only

1 fifteen minutes earlier than their current schedule. If anything, Tupy and Glenn’s testimony
2 demonstrates that DSP and V Theater will benefit from having these employees arrive at work
3 early enough to complete their pre-show tasks prior to the audience entering the theater and the
4 show beginning. I therefore grant this interim relief.⁶

5 **D. Removing Discipline from Employee Files**

6 Overstreet requests that I order DSP and V Theater to remove from the discharged
7 employees’ files all references to their firing. He also requests that I order DSP and V Theater to
8 remove from Tupy’s file the June 2018 discipline. I deny this request because such interim relief
9 is unnecessary. The Board will resolve whether the employees were discharged or disciplined in
10 retaliation for their union activities. Purging the files now is premature, especially if the Board
11 finds the discharges and discipline were justified.

12 **E. Posting, Emailing, and Reading the Order**

13 I grant a mandatory injunction requiring DSP and V Theater to (1) post copies of this
14 order at the workplace and allow the NLRB access to the workplace to monitor that this has been
15 done, (2) hold a mandatory meeting at which specific portions of this order will be read aloud to
16 bargaining unit employees, (3) email this order to employees or give the Board the employees’
17 email addresses so the Board can email it, and (4) submit an affidavit saying these things have
18 been done. The Ninth Circuit has approved the remedy of a mandatory meeting to read a Board
19 order to employees. *United Nurses Ass’ns of Cal.*, 871 F.3d at 788-89. A reading is not “an
20 extraordinary remedy.” *Id.* Rather, it is “an effective but moderate way to let in a warming wind
21 of information and, more important, reassurance.” *Id.* (quotation omitted). In *United Nurses*, the
22

23 ⁶ Overstreet does not request relief related to Glenn’s claim that he no longer is called in early for maintenance and repairs. I therefore do not address that issue beyond it being evidence that DSP and V Theater retaliated against Glenn for his union support.

1 Ninth Circuit concluded a reading order “was clearly warranted in light of [the employer’s]
2 several unfair labor practices, including its retaliatory firing of a prominent Union supporter.” *Id.*
3 Thus, although a reading order is in a sense mandatory injunctive relief, it is not particularly
4 burdensome and is meant to remedy the harm caused by the unfair labor practices in
5 undermining employee confidence in the union. If DSP and V Theater do not want to read the
6 order, a Board representative can do so. Likewise, if DSP and V Theater do not want to email
7 the order, they may provide the Board with the employees’ email addresses, and the Board may
8 email the order to the employees.

9 **VI. CONCLUSION**

10 IT IS THEREFORE ORDERED that petitioner Cornele A. Overstreet’s motion to
11 expedite (**ECF No. 2**) and motion to try the petition on the papers (**ECF No. 3**) **are GRANTED**.

12 IT IS FURTHER ORDERED that petitioner Cornele A. Overstreet’s petition for
13 temporary injunction (**ECF No. 1**) **is GRANTED in part**.

14 IT IS FURTHER ORDERED that, pending completion of the underlying administrative
15 proceedings before the Board, respondents David Saxe Productions, LLC and V Theater Group,
16 LLC are hereby **RESTRAINED AND ENJOINED** from:

- 17 1. Discharging, disciplining, reducing the hours of, assigning more onerous working
18 conditions to, or otherwise discriminating against employees because of their union
19 support, union activity, or other activity protected by Section 7 of the National Labor
20 Relations Act;
- 21 2. Seeking to induce employees to abandon their organizing activities by granting them
22 benefits including wage increases and promotions;
- 23 3. Creating the impression that employees’ union activities are under surveillance; and

1 4. Threatening employees with unspecified reprisals or job loss for engaging in
2 protected, concerted activity or supporting a union.

3 IT IS FURTHER ORDERED that respondents David Saxe Productions, LLC and V
4 Theater Group, LLC shall:

5 A. Within 10 days of the date of this order, offer Zachary Graham, Kevin Michaels,
6 Chris S'uapaia, Leigh-Ann Hill, Michael Gasca, Jasmine Glick, and Alanzi Langstaff, in writing,
7 immediate reinstatement to their former jobs, or if those jobs no longer exist, to substantially
8 equivalent positions of employment, without prejudice to their seniority and other rights and
9 privileges previously enjoyed, displacing if necessary any workers hired or transferred to replace
10 them.

11 B. Within 10 days of the date of this order, restore Scott Tupy and Darnell Glenn to
12 their former work schedules.

13 C. Within 10 days of the date of this order, post copies of this order at all theaters at
14 the respondents' facilities at which bargaining unit employees⁷ are employed, where notices to
15 employees are customarily posted, and at each of the time clocks that employees use, and
16 maintain these postings free from all obstructions and defacements during the pendency of the
17 Board's administrative proceeding.

18 D. Within 10 days of this order, either (1) email a copy of this order to all bargaining
19 unit employees at the email address that the respondents use to communicate work matters to
20 employees, or (2) provide the email addresses of all bargaining unit employees to the Board so
21 the Board may email the order to the employees.

22
23

⁷ By bargaining unit employees, I mean those employees who would fall within the unit
identified in the stipulated election agreement. ECF No. 1-6 at 99.

1 E. Within 10 days of this order, hold a mandatory meeting or meetings during
2 working time at the respondents' facilities, at which the following portions of this order are to be
3 read aloud: page 1 line 1 through page 3 line 18; page 22 lines 2-4; and page 40 line 10 through
4 the end of the order.⁸ Those portions are to be read aloud by a responsible management official
5 in the presence of an agent of the Board, or at the respondents' option by an agent of the Board
6 in that official's presence. It shall be read aloud to all employees in the identified bargaining
7 unit, including at multiple meetings as necessary to ensure that the order is read aloud to all
8 bargaining unit employees.⁹ The employees also shall be told that my findings are set out in full
9 in this order, which they can read in the posted and emailed copies.

10 E. Within 21 days of this order, file with the court and submit a copy to the Regional
11 Director for Region 28 of the Board a sworn affidavit from a responsible agent of the
12 respondents stating, with specificity, the manner in which the respondents have complied with
13 the above terms of this order.

14 DATED this 24th day of January, 2019.

15 
16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
18
19
20
21

22 ⁸ This order is quite lengthy, so I will not require a full reading aloud. The order will be posted
and employees will receive an electronic copy, so they may read the details for themselves.

23 ⁹ If the employees work on different shifts, the respondents shall hold a sufficient number of
meetings to accommodate those different schedules.